has raised the same issues of fact, i.e. theft, which is relevant to both sections 454 and 380 of the Penal Code. Therefore, applying the above principle and on the authority of *Sivalingam* v. *Public Prosecutor (supra),* I am of the opinion that the requirements of sections 166 and 167 of the C.P.C. are satisfied. As such, I substitute the conviction to one under section 380 of the Penal Code and reduce the sentence to three years' imprisonment.

Order accordingly.

PUBLIC PROSECUTOR v. CHAI CHONG YIN & ANOR.

[O.C.J. (Mohamed Dzaiddin J.) November 26, 1982]
[Kuala Lumpur – Selangor Criminal Trial No. 1 of 1982]

Criminal Law & Procedure – Possession of dangerous weapons – Charge for offences under Internal Security Act 1960 – Consent to prosecute under I.S.A. – Objection to amended charges – Whether any amendment of charge must be within consent of Public Prosecutor.

Internal Security – Possession of dangerous weapons – Internal Security Act 1960, s. 57(1)(a) & (b).

The two accused were jointly charged on amended charges for being in control of a pistol and ammunition without lawful excuse and authority and therefore had committed offences under the Internal Security Act 1960, s. 57(1)(a) & (b).

Counsel for both accused raised preliminary objections in respect of the amended charges. Both the first and the second accused were originally charged at the material time, date and place for being in control of the same pistol except the serial number for the Llama pistol was registered as 934383 and one primed home-made handgrenade toge ther with a total of 88 rounds of live .32 ammunition. On March 14, 1981 the Public Prosecutor issued his consent to prosecute under s. 80 of the Internal Security Act and the accused were subsequently committed for trial on June 30, 1982.

Counsel for the accused referred to the amended charges in particular the serial number which was altered to 984383 and the total number of .32 ammunition being 96. He submitted that any amendment of the charge must be within the consent of the Public Prosecutor. If not, the proceeding was a nullity. The accused should be entitled to a discharge not amounting to an acquittal for the proceeding to be regularised.

Held: (1) under section 80 of the Internal Security Act 1960, the prosecution shall not be instituted except with the consent of the Public Prosecutor. Unlike a charge, section 80 does not provide any particular form of consent. There is no requirement under the said Act that the material particulars to the offence must be specifically stated or particularised in the consent;

(2) having regard to the case as a whole, the defence had not raised any reasonable doubt in the prosecution case. In the circumstances both accused were guilty of the charge and accordingly sentenced to death.

CRIMINAL TRIAL.

Gooi Soon Seng (Deputy Public Prosecutor) for the Public Prosecutor.

Karpal Singh (*Ngeow Yin Ngee* with him) for the 1st and 2nd Accused.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: Both the first and second accused are jointly charged on amended charges for being in control of one .32 pistol of Astra brand and fifty-three rounds of .32 ammunition and one .32 pistol of Llama brand serial No. 984383 and forty-three rounds of .32 ammunition without lawful excuse and authority in house No. 7196, Taman Selayang, Gombak, Kuala Lumpur, at about 7.30 p.m. on June 18, 1977 and therefore have committed offences under Section 57(1)(a) and 57(1)(b) of the Internal Security Act 1960.

At the onset of the proceeding, Mr. Karpal Singh, counsel for both accused, raised preliminary objections in respect of the amended charges. Both the first and second accused were originally charged at the material time, date and place for being in control of the same pistols except the serial number for the Llama pistol was registered as 934383 and one primed home-made handgrenade together with a total of eighty-eight rounds of live .32 ammunition. On March 14, 1981 the Public Prosecutor issued his consent to prosecute under Section 80 of the ISA (Exhibit P.1) and the accused were subsequently committed for trial on June 30, 1982.

Mr. Karpal Singh drew my attention to the change in the particulars of the items as appearing in the amended charges and, in particular, he referred to the serial number being now stated as 984383 and the total number of .32 ammunition being ninety-six. He submitted that any amendment of the charge must be with the consent of the Public Prosecutor (Exhibit P.1). There should be committal on the basis of fresh consent. If not, the proceeding is a nullity. The accused should be entitled to a discharge not amounting to an acquittal for the proceeding to be regularised.

After hearing the reply from the learned DPP, I overruled Mr. Karpal's objection. My reasons are as follows. First, I find that under Section 80 of the ISA the prosecution shall not be instituted except with the consent of the Public Prosecutor. The said consent (Exhibit P.1) merely states consent for the prosecution of both accused under Section 57(1)(a) and 57(1)(b) alleged to have been committed on June 18, 1977 at the same place as in the original charges. Secondly, unlike a charge, Section 80 does not provide any particular form of consent. In my view, there is no requirement under the said section or, indeed, under the Act that the material particulars of the offence must be specifically stated or particularised in the consent. Lastly, Regulation 6(3) of the Essential (Security Cases) (Amendment) Regulation 1975 gives the Public Prosecutor wide powers to alter or amend the charges or even prefer an additional charge or charges before judgment.

Seven witnesses gave evidence for the prosecution and fourteen others were made available to the defence. From the evidence, the prosecution case is as follows. On June 18, 1977 on information received, a Special Branch police party of eight officers from Selangor headed by ASP Loke Yee Leong (P.W.1) proceeded to house No.7196, Taman Selayang, Selayang, Selangor, with instruction to check the said premises and to lay an ambush. P.W.1 and his men arrived at the premises at about 10.00 a.m. On arrival, he called for a person named "Pang". Then, he noticed someone peeped through the window louvres of the house. One pregnant woman came out to open the front gate with a padlock. She was identified by P.W.1 as Lim Siew Kim, being one of the two occupants of the house. After identifying himself, P.W.1 and the police party entered the house and conducted a search. He started with the ground floor. The sitting room was vacant, but the kitchen had a cabinet for storing food. There were also cooking utensils in the kitchen. P.W.1 did not find anything incriminating on the ground floor. He and the police party then went up to the top floor. There were three rooms; and in one room, he found one old woman inside the room. She was identified as Wong Moi. He did not find anything incriminating in her room. He then searched the left room and saw some clothing hanging inside the room and one paper-bag. In the paper-bag, he found a handgrenade. He then searched the third room which was empty. He detained both Lim Siew Kim and Wong Moi and instructed Woman Inspector Chong Siew Pin to guard them.

On the same date at about 7.30 p.m., P.W.1 saw two male Chinese outside the gate calling for someone. He immediately went upstairs and asked Lim Siew Kim to open the door for the two Chinese to enter. She refused. He asked Wong Moi who also refused. He then opened the door himself and invited the two Chinese to enter the house. As soon as they entered the house, the police party pounced on them. After identifying themselves as police officers, the two Chinese were told to put up their hand. He placed both of them against the wall with their hands up. He first searched the first accused. He found a pistol (Exhibit P. 5) on his body tied with a belt. The pistol was loaded with eight rounds of ammunition inside a magazine. It has a plastic holster (Exhibit P.5A). He then took out a handgrenade from inside the left trouser pocket of the first accused and also recovered forty-five rounds of ammunition from the right trouser pocket. These ammunition were in a plastic pouch (Exhibit P.7). Next, he searched the second accused and found a pistol (Exhibit P.8) in the right trouser pocket. There were eight rounds of ammunition inside the magazine with a green plastic holster (Exhibit P.8A). He also recovered thirty-five rounds of ammunition in a plastic pouch (Exhibit P.10) from the same right trouser pocket of the second accused. On completion of the search, he handcuffed both accused and subsequently handed them with the exhibits to ASP Abdul Rahman bin Abdullah (P.W.3). He then lodged a police report in Police 55 (Exhibit P.11) and handed the same back to ASP Abdul Rahman (P.W.3).

From the evidence of P.W.1, it is clear that the accused fell into the trap of the Special Branch ambush party headed by him. I accept his evidence that the firearms and the ammunition which were subject matters of the two amended charges were at the material time in the control of both the accused and they were recovered by him from the accused persons. Admittedly, P.W.1 did not make any search list of the exhibits recovered. This omission is not fatal to the prosecution case. However, his evidence regarding the recovery of these exhibits is consistent with his police report (Exhibit P.11) and the evidence of Inspector Lim Kek Peng (P.W.2). As a matter of fact, P.W.1's evidence is materially and amply corroborated by P.W.2.

In his evidence, P.W. 2 stated that he was one of the police officers in the ambush party headed by P.W.1. On arrival at the premises No. 7196 Taman Selayang Baru, a young pregnant woman

opened the door. They were allowed into the house and conducted a search of the premises. They remained in the house until about 7.30 p.m. when he heard someone calling a name from outside the house. Together with the rest of the ambush party, he took up position at the back room of the house. P.W.1 went to open the door. As soon as the two accused entered the house, the police party pounced on them. He shouted the word "police". The two accused were then asked to stand with their face to the wall and their hands placed against the wall. Their legs were stretched apart. He saw P.W.1 conducting a search on the person of the accused. He saw P.W.1 taking out the exhibits from the trouser pockets of both accused. However, under cross-examination, he stated that P.W.1 after taking the exhibits from the accused on each occasion put these exhibits on the staircase. He said that he saw clearly P.W.1 recovering a gun from the second accused. This was in answer to counsel's question that P.W.1 has stated in his report (Exhibit P.11) that the pistol was tucked in the second accused's right trouser pocket. Notwithstanding some minor discrepancies in P.W.2's evidence, I accept his evidence regarding the recovery of the exhibits by P.W.1 from both accused. I have no reason to disbelieve his testimony.

The next prosecution witness was ASP Abdul Rahman bin Abdullah (P.W.3) who stated that on June 18, 1977 at about 8.30 p.m., he went to Selayang Baru with instruction to escort back the two accused to the Petaling Jaya Police Station. On arrival at premises No. 7196, he met P.W.1 and handed him a Police 55. Then at about 11.30 p.m. on the same evening, he returned to P.J. Police Station with the two accused and the exhibits. He also brought back the Police 55. He handed the accused and the exhibits to DSP Ramachandran (P.W.4). In his evidence, P.W.4 confirmed having received these exhibits. On June 22, 1977, he handed the exhibits to DSP Haidar (P.W. 5) who was then the Investigation Officer in the case. P.W. 5 confirmed having received these exhibits from P.W.4.

On June 25, 1977, ASP Wong Ban Foo (P.W.6), the Contingent Armament Officer at Wilayah Police, Jalan Bandar, Kuala Lumpur, received the following exhibits from P.W.5, who was then the OCPD Rawang, through P.C. Alidon in respect of Selayang Report 1391 of 1977 (Exhibit P.11):—

(a) One Astra.32" Auto. Pistol with magazine and 8 rounds. 32" ammos. (in Mag.).

(b) One Llama. 32" Auto. Pistol with magazine and 8 rounds .32" ammos. (in mag.).

(c) One green plastic pouch containing 45 rounds .32" ammos.

(d) One green plastic pouch containing 35 rounds .32" ammos.

On July 1, 1977 P.W.6 carried out an examination of the exhibits and tested the guns. In his opinion, Astra .32 automatic pistol (Exhibit P.5) and one Llama automatic pistol (Exhibit P.8) and 96 rounds of ammunition were in good condition and serviceable. He test-fired three rounds from each gun, and he was of the opinion they were serviceable. His report was produced and marked as Exhibit P.12. I accept P.W.6's evidence. These exhibits were subsequently identified by Chief Inspector Skeikh Ariffin (P.W.7) who took over as the I.O. from P.W.5. They are as follows:—

(1) One .32 pistol Astra identified as Exhibit P.5.

(2) One.32 Llama Special No. 984383 identified as Exhibit P.8.

(3) One envelope containing three expanded casings marked as Exhibit P.6B and five rounds of .32 ammunition marked as Exhibit P.6A.

(4) One envelope containing five expanded casings marked as Exhibit P.9B, and three rounds of .32 ammunition marked as Exhibit P.9A.

(5) One envelope containing 10 expanded casings marked as Exhibit P.9C.

(6) One envelope containing 25 rounds of .32 ammunition marked as Exhibit P.9.

(7) One envelope containing 40 rounds of ammunition marked as Exhibit P.6.

(8) One envelope containing 5 expanded ammunition marked as Exhibit P.6C.

He also received a copy of P.W.6's report of his finding marked as Exhibit P.12.

At the close of case for the prosecution and after having heard the submission of defence counsel and the DPP, I was satisfied that the prosecution has established its case on both amended charges which, if unrebutted, would warrant a conviction.

In their defence, both the first and second accused elected to give evidence on oath. The first accused (D.W.1) denied that he was in control of .32 pistol and fifty-three rounds of ammuni-

tion. He stated that when someone opened the door of his house, a police party rushed to him and Accused No.2 and asked them to put up their hands. They stood against the wall with their hands up and legs apart. He was then searched. He also alleged that as soon as they were surrounded by the police personnel, they were assaulted, punched and kicked. He said that the search took place in the middle of the hall. It was not bright. The police recovered from him about $300/- to $400/- cash, one driving licence, one Identity Card and a bunch of keys. These were the only items recovered from him. After the search, both he and the second accused were handcuffed. He was subsequently taken to P.J. Police Station. According to him, he was detained at various police lock-ups from the time he was arrested until he was finally charged on January 13, 1982.

Mr. Karpal Singh made an application for the second accused to be examined by a medical officer to determine his mental condition in order to ascertain his competency to give evidence. According to him, counsel found difficulty to get instructions from the second accused. Under Section 342 of the Criminal Procedure Code, before I grant such application, I must have reason to suspect that the accused person is of unsound mind and consequently incapable of making his defence and shall then investigate as to the facts of such unsoundness. In order to satisfy myself whether I have reason to suspect that the accused person is of unsound mind, I ordered him to the witness-stand and questioned him. I asked him if he knew the first accused and where he was on June 18, 1977. He gave a perfectly natural reply to my questions. His appearance and behaviour was also of a normal person. I have no reason to suspect that he was of unsound mind. In the circumstances, I disallowed defence application and proceeded with the case.

In his evidence, D.W.2 admitted that on June 18, 1977 he was arrested by the police together with D.W.1. As soon as he entered the house of D.W.1, he saw a number of people rushing to them. He asked the first accused who they were. These people pointed guns at him. He did not resist but surrendered. He was made to face the wall and a body search was conducted. According to him, his shirt and trousers were cut with scissors, and they recovered from him one pistol and bullets. He had his pistol in his pocket. He did not know why they cut his trousers. D.W.2 also stated that a pistol and ammunition were also recovered from the first accused.

The defence also called two formal witnesses, Mohd. Ali bin Yusoff and Shaharom bin Hassan, both from the Ministry of Home Affairs. They gave evidence regarding the "Allegation of Facts" in the Detention Orders (Exhibits D.15 and D.16) in respect of both accused. These Detention Orders were dated August 16, 1977; and under paragraphs 4 and 6 respectively, the amount of ammunition mentioned therein was different from those appearing in the charges. I cannot see the relevancy of this evidence in so far as the amended charges are concerned. It is clear from Regulation 6(3) of the Essential (Security Cases) (Amendment) Regulation 1975 that the Public Prosecutor has wide powers to amend the charges at any time before judgment. It is immaterial whether the amount of ammunition in the amended charges are different from those stated in the "Allegation of Facts". What is material is, of course, for the prosecution to prove beyond reasonable doubt the ingredients of the charge which, in the case before me, it has done so.

Now, having considered the evidence and the demeanour of the two accused, in particular the admission of the second accused that he was in possession of the pistol and ammunition, it is my finding that the first accused's denial that the police party did not recover a pistol and ammunition cannot be believed. Again, the allegation made by the first accused that he was assaulted, punched and kicked by the police party was not supported by any evidence. Therefore, having regard to the case as a whole, in my judgment, the defence has not raised any reasonable doubt in the prosecution case. On the contrary, I am satisfied beyond reasonable doubt that they were caught red-handed and the guns and ammunition, the subject-matters of both charges, were under their control without lawful authority. In the circumstances, I find both accused guilty of the charge. As the mandatory sentence in respect of this offence is death, I accordingly sentenced both accused to death.

Sentenced accordingly.

Solicitors: *Ngeow & Co.*